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Legislation Review Committee

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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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Guide to the Digest

COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

COMMENT ON REGULATIONS

This section contains the Legislation Review Committee's reports on Regulations in accordance with section 9 of the *Legislation Review Act 1987*.

Conclusions

PART ONE – BILLS

1. APPROPRIATION BILL 2020; APPROPRIATION (PARLIAMENT) BILL 2020; PAYROLL TAX AMENDMENT BILL 2020 (COGNATE BUDGET BILLS)

The Committee makes no comment on the Bill in respect of the issues set out in section 8A of the Legislation Review Act 1987.

2. CRIMES (DOMESTIC AND PERSONAL VIOLENCE) AMENDMENT (COERCIVE AND CONTROLLING BEHAVIOUR) BILL 2020*

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Lack of certainty

Schedule 1 to the Bill seeks to insert a new section 14A into the *Crimes (Domestic and Personal Violence) Act 2007*, making it an offence for a person to engage in behaviour that is 'abusive' of another person with whom the person has, or has had, a domestic relationship.

Proposed section 14A(2) of the Bill defines 'abusive' behaviour broadly to include conduct that has, or is reasonably likely to have, certain effects including 'making the other person dependent on, or subordinate to, the person'; 'controlling, regulating or monitoring the other person's day to day activities'; 'depriving the other person of or restricting the other person's freedom of action'; and 'frightening, humiliating, degrading or punishing the other person'. The Committee notes that the language used in this definition may be perceived by some as quite broad.

The Committee generally prefers offence provisions, particularly those with potential terms of imprisonment attached, to be drafted with sufficient specificity so that their scope and content is clear. This enables people to have a clear idea of the behaviour outlawed so that they may regulate their own behaviour accordingly.

The Committee acknowledges that the Bill aims to reduce rates of domestic abuse, and to recognise the severe effects that coercive control can have on victims. The Committee also notes the provision made in section 14B for the Minister to undertake periodic reviews of the Act, to determine whether its terms 'remain appropriate' for securing its objectives. However, the Committee refers the Bill to Parliament to consider whether the broadly defined new offence, in its current form, would impact on principles of legal certainty.

Retrospectivity

Section 14A(8) provides that the domestic abuse offence in section 14A(1) extends to a course of behaviour that began before the commencement of the section, provided the behaviour occurred on at least one occasion after the commencement. This means that the offence in section 14A effectively captures behaviour that occurred prior to its introduction, so that the offence has partial retrospective effect.

The Committee will usually comment about retrospectivity as it runs counter to the rule of law principle that a person is entitled to know the law that applies to him or her at any given time.

While this provision does make behaviour occurring prior to its introduction liable to punishment, this can only occur where the behaviour continued after the offence came into force. The Committee also acknowledges that the objective of the Bill is to recognise the repeated nature of abusive conduct in domestic relationships, and the cumulative effect this has on its victims. However, as the provision seeks to act retrospectively, and attaches a criminal penalty, the Committee refers the Bill to the Parliament for its consideration.

Reversal of onus of proof

Section 14A(6) provides for a presumption, rebuttable on the balance of probabilities, that an accused person has or has had a domestic relationship with their alleged victim. In effect, this provision reverses the onus of proof for one element of the offence in section 14A(1).

This provision may impact the defendant's right to a fair trial, including the right to be presumed innocent unless guilt is proved beyond reasonable doubt.

The Committee notes the justification provided for this provision in the second reading speech, that the court's time should not be wasted arguing over the 'technicality' of whether or not a domestic relationship exists. The Committee also acknowledges, as the second reading speech suggests, that the definition of a 'domestic relationship' in the *Crimes (Domestic and Personal Violence) Act 2007* is broad.

However, the Committee refers this matter to Parliament to consider whether the reversed onus in subsection 14A(6) has an undue impact on prospective defendants' right to a fair trial.

PART TWO – REGULATIONS

1. ELECTRICITY SUPPLY AMENDMENT (ENERGY SAVING) AMENDMENT REGULATION 2020

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII clause

The *Electricity Supply Amendment (Energy Savings) Regulation 2020* amends the *Electricity Supply Act 1995,* made possible by a Henry VIII clause in the Act. This is an inappropriate delegation of legislative power. Primary legislation should not be changed by subordinate legislation because it reduces parliamentary scrutiny of those changes.

Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987),* the statutory rule may have already been in operation for some time before disallowance occurs.

The Committee refers this matter to Parliament for further consideration.

2. ELECTRICITY SUPPLY (GENERAL) AMENDMENT (REMOTE DE-ENERGISATION AND RE-ENERGISATION) REGULATION (NO 3) 2020

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Strict Liability offences and large penalities

The *Electricity Supply (General) Amendment (Remote De-energisation and Re-energisation) Regulation (No 3) 2020* introduces a number of strict liability offences which may be committed by both energy retailers and metering providers in failing to complete certain tasks related to remotely energising, re-energising or de-energising small customers' premises quickly enough. For example, a retailer must ensure steps are taken for a small customers' remote energisation to take place on the next business day after the request is made by the customer, provided that request is made before 3pm. Similar duties rest with metering providers who have been instructed to action remote energisation, re-energisation or de-energisation.

The Committee notes that the offences created by the Regulation are of strict liability. The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence. That is, the retailer or metering provider need not intend for a small customers' re-energising to occur any later than the business day after their request in order for the relevant retailer or metering provider to be held liable for a penalty.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the offence provision is designed to proactively prevent any costly delays in connecting or disconnecting small customers to or from power. Further, the maximum penalties for the offences are monetary, not custodial. The Regulation has also been drafted following a public consultation process conducted by the NSW Department of Planning, Industry & Environment. In these circumstances, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Adverse impact of energy retailers

The Regulation introduces a number of strict liability offences which may be committed by both energy retailers and metering providers in failing to complete certain tasks related to remote energisation, de-energisation or re-energisation quickly enough when dealing with small customers. The significant penalties associated with these offences may adversely impact on energy businesses. For example, energy retailers and metering providers will need to be able to adapt and act quickly to action customers' requests when remotely energising, de-energising or re-energising small customers' premises. If one connection is delayed for a day, it could result in penalties of up to $110,000 per incident of delay plus compensation to the customer.

However, given remote energisation has been prohibited for some time to allow for public consultation process to take place, energy businesses are likely to already have appropriate practices and systems in place to quickly respond to remote energisation requests. The innate nature of remote energisation also lends itself to being actionable quickly without the delays associated with physical site visits. In these circumstances, the Committee makes no further comment.

3. FISHERIES MANAGEMENT (POSSESSION LIMIT) (ESTUARY COCKLES) ORDER 2020

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Reduced possession limits with substantial penalties

The *Fisheries Management (Possession Limit) (Estuary Cockles) Order 2020* reduces the possession limit for cockles from 50 to 20. The Order may have an adverse effect on commercial fishing operators, particularly as the penalty for contravening a possession limit is substantial for both corporations and individuals. The maximum penalty under the Act for breaching the possession limit is $110,000 for corporations and $22,000 for individuals or 6 months' imprisonment, or both. However, the Committee notes the conservation objects of the *Fisheries Management Act 1994*, under which the Order is made, and the fact that a possession limit of 50 cockles previously existed. Accordingly, the Committee makes no further comment.

4. GAS AND ELECTRICITY (CONSUMER SAFETY) AMENDMENT (MEDICAL GAS WORK) REGULATION (NO 2) 2020

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

New and strict liability offences

The Regulation introduces a number of new strict liability offences for contravening requirements in the Regulation with respect to performing or supervising medical gasfitting work, medical gas technician work and the safety and compliance test testing of medical gas systems. Some of these have substantial maximum penalties. The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence.

However, strict liability offences are not uncommon in regulatory settings to encourage compliance. The Committee acknowledges that the increased regulatory requirements with respect to medical gas systems are intended to recognise those systems as critically important in preserving life, and to protect public safety. Further, the Regulation has undergone a consultation period during September 2020. In addition, proposed clauses 69B-69D (relating to safety and compliance testing penalties) do not commence until 1 May 2021, allowing for a staged implementation giving the business community an opportunity to familiarise itself with the new provisions. In the circumstances, the Committee makes no further comment.

5. GAS AND ELECTRICITY (CONSUMER SAFETY) AMENDMENT (REMOTE DE-ENERGISATION AND RE-ENERGISATION) REGULATION 2020

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Strict liability offences with large penalties

The Regulation introduces two new strict liability offences. The first is derived from section 34 of the *Gas and Electricity (Consumer Safety) Act 2017* which requires any electrical installation, gasfitting, or autogas work to be done in accordance with the standards or requirements (if any) prescribed by the regulations. This Regulation requires, for the purposes of section 34 of the Act, that all electrical installation work that is remote de-energisation or remote re-energisation of premises be done by a metering provider who has a safety management and technical procedures plan in force, carries out the remote de-energisation or remote re-energisation in accordance with the plan, and has received a request from a retailer for the remote de-energisation or remote re-energisation of the premises. Penalties for this offence, which are set out in the Act, are financially significant, and repeated offences may result in a custodial sentence.

The second offence requires a retailer to have a safety management and customer procedures plan in force and comply with that plan before arranging the remote de-energisation or remote re-energisation of premises with a metering provider. This offence does not involve a potential custodial sentence but still involves a significant maximum penalty of approximately $27,000 for an individual and $55,000 for a corporation.

The Committee also notes that both of the offences created by the Regulation are of strict liability. The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence. That is, offending retailers need not intend for de-energisation or re-energisation to occur without a safety management and customer procedure plan in place or intend for any de-energisation or re-energisation to occur in any way inconsistent with those plans for that retailer to incur a penalty.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the offence provisions are designed to ensure safety management and customer procedure plans are in place before any remote de-energisation or re-energisation occurs at the behest of either energy retailers or metering providers. The maximum penalties for the failure to comply with clause 38B of the Regulation are significant, including a maximum penalty of 2 years imprisonment or $750,000 for corporations in the event of repeated offences. However, these penalties are set out in section 34 of the Act, rather than the Regulation. Also, the higher penalties are only incurred by repeat offenders, and guidance material has been provided on how to successfully develop and implement safety management plans. In the circumstances, the Committee makes no further comment.

6. GAS SUPPLY (SAFETY AND NETWORK MANAGEMENT) AMENDMENT (HYDROGEN GAS) REGULATION 2020

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Additional categories of gas for which distributor's licence is required

The *Gas Supply (Safety and Network Management) Amendment (Hydrogen Gas) Regulation 2020* prescribes additional types of gas which now require a distributor's licence. For example, clause 37A of the Regulation prescribes pure hydrogen gas and hydrogen gas mixtures as types of gas that will now require a licence. Operating a distribution system to convey those gases without such a licence attracts a maximum penalty of 500 penalty units ($5,500) for a corporation, and 50 penalty units ($55,000) in any other case.

Applications for a distributor's licence attract a fee, as determined by the Minister; may take up to 6 months (or more in some circumstances) to process; and may be refused by the Minister on a variety of grounds. Ongoing licence fees, also determined by the Minister, are incurred on a yearly basis.

This may create an additional administrative burden for businesses already operating hydrogen gas distribution systems in New South Wales. Non-compliance with the provision by a corporation may also attract significant penalties.

However, the Committee notes that the amendment is in line with recommendations made by the COAG Energy Council, and appears to be part of a broader strategy to increase the use of

hydrogen gas as a form of renewable energy. In the circumstances, the Committee makes no further comment.

7. PUBLIC HEALTH AMENDMENT (COVID-19 SPITTING AND COUGHING) REGULATION (NO 3) 2020

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offences – right to fair trial

The Public Health (COVID-19 Spitting and Coughing) Regulation (No 3) 2020 allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its Digests No 13/57 and Digest 17/57, the Committee commented on previous regulations which also provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order, both of which have now expired.

Consistent with those comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters that should be included in primary legislation

The Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 3) 2020 allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its Digests No 13/57 and Digest 17/57, the Committee commented on a previous regulation which also provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order, both of which have now expired.

Consistent with those comments, the Committee identifies that it generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to

emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

8. RESIDENTIAL TENANCIES AMENDMENT (COVID-19) (NO. 2) REGULATION 2020

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Retrospectivity and property rights

The Residential Tenancies Amendment (COVID-19) (No 2) Regulation 2020 extends, with amendments, the operation of Part 6A of the Residential Tenancies Regulation 2019 and Part 5 of the Boarding Houses Regulation 2013 until 26 March 2021.

The Regulation limits certain rights of landlords and boarding house proprietors in response to the pandemic. For example, a landlord generally cannot evict a tenant who is financially impacted by COVID-19 for non-payment of rent. An exception exists where the landlord has negotiated in good faith and the termination notice is fair and reasonable in the circumstances.

A boarding house proprietor must also generally give 6 months' notice of a proposed eviction to a resident who cannot pay their occupancy fees because of COVID-19, with some exceptions.

In retrospectively limiting landlords' and proprietors' rights, the Regulation may impact on property rights. The Committee generally comments on provisions drafted to have retrospective effect, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. Similarly, by limiting the ability of the landlord or proprietor to exercise their rights under an existing agreement, the Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants and residents. The provisions outlined above are automatically repealed on 26 March 2021. The Committee notes that the Regulation also furthers the public health objectives of ensuring citizens remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

9. SPORTING VENUES AUTHORITIES AMENDMENT REGULATION 2020

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Freedom of movement and administrative review rights

Several provisions in the *Sporting Venues Authorities Amendment Regulation 2020* (Amendment Regulation) impact freedom of movement on scheduled lands, which include the Sydney Cricket Ground and Sydney Football Stadium. They restrict entry to the scheduled lands, and permit individuals to be refused entry to, removed and/or banned from the scheduled lands in certain circumstances. Venues NSW may ban a person from the scheduled

lands for up to two years if they contravene a provision of the Regulation. The penalty for non-compliance with a ban is 10 penalty units or $1,100.

There does not appear to be any requirement for Venues NSW to provide reasons for these decisions, nor any avenue for bans to be reviewed or appealed.

These provisions may impact on individuals' freedom of movement. For example, the basis on which a person can be removed under the Regulation is quite broad – including if they 'cause inconvenience' to another person.

However, restrictions on the right to freedom of movement may be warranted in certain circumstances – for example, to protect public order. The provisions in the Regulation are in line with similar regulations governing recreational spaces used by the public, where the site is managed by a trust or authority. The Committee also acknowledges the benefit of the provisions for the majority of those using the scheduled lands, allowing the peaceful enjoyment of the environment and amenities, and discouraging anti-social or disruptive behaviour. Finally, the Committee notes that similar offences restricting freedom of movement existed under the repealed *Sydney Cricket Ground and Sydney Football Stadium By-law 2014*. In the circumstances, the Committee makes no further comment.

Penalty notice offences – right to a fair trial

Schedule 1 to the Amendment Regulation lists 44 offence provisions for which penalty notices may be issued. Penalty notices allow a person to pay the amount specified for an offence within a certain amount of time should he or she not wish to have the matter determined by the court. The fine payable under a penalty notice is usually less than the maximum penalty that would otherwise apply. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

The Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the issuing of a penalty notice does not prevent a person from electing to have the matter determined by a court. Still, there is a risk that some may waive this right and pay the on-the-spot fine to avoid the need to attend court and/or the risk of having a larger penalty imposed. However, the Committee notes that similar penalty notices, for equivalent offences, were provided for under the repealed *Sydney Cricket Ground and Sydney Football Stadium By-law 2014*. Given this, and the relatively small size of fines issuable by penalty notice – ranging from $80 to $330 – the Committee makes no further comment.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Strict liability offences not in primary legislation

The Amendment Regulation sets out numerous offences relating to behaviour on the scheduled lands, each with a penalty of 10 penalty units ($1,100). A number of these offences are strict liability offences – that is, there is no mental element of intention or recklessness needed in order to prove the offence.

The Committee prefers provisions which create offences to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. This is

particularly the case where offences affect individual rights and liberties, such as the right to freedom of assembly, discussed above.

The Committee also generally comments on strict liability offences as they depart from the common law principle that *mens rea*, the mental element of an offence, is relevant to the imposition of liability. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Given the relatively small penalties attached to these offence provisions, and the fact that similar offences existed under the previous *Sydney Cricket Ground and Sydney Football Stadium By-law 2014*, the Committee makes no further comment.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Vague and ill-defined power

The Amendment Regulation grants Venues NSW some powers that may be ill-defined and could benefit from further clarification. In particular, clauses 12 and 34 provide that Venues NSW may determine terms or conditions of entry to the scheduled lands, but do not provide any guidance as to how those terms or conditions should be determined. Further, there is no provision requiring terms or conditions affecting vehicles to be displayed or communicated to vehicle drivers. Failure to comply with terms or conditions of entry attracts a penalty of up to $1,100. These provisions may thereby make individual liability dependent on an insufficiently defined administrative power.

The Committee also notes that the terms or conditions imposed by Venues NSW are not required to be tabled in Parliament, and are therefore not subject to any parliamentary oversight.

The Committee prefers provisions that affect rights and obligations to be drafted with sufficient precision so that their scope and intention is clear. However, the Committee acknowledges that it is important in a regulatory context for Venues NSW to retain a relatively high level of discretion. This may include a flexible power to impose different conditions on entry based on vehicle size, type of event, time of day, etc. In the circumstances, the Committee makes no further comment.

10. SURVEILLANCE DEVICES AMENDMENT (BODY WORN RECORDING DEVICES) REGULATION 2020

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Privacy

The *Surveillance Devices Amendment (Body-Worn Recording Devices) Regulation 2020* (Amendment Regulation) extends the trial period during which ambulance officers will be exempt from certain requirements of the *Surveillance Devices Act 2007* for 12 months.

This exemption, and its extension by the Amendment Regulation, has the potential to impact individuals' right to privacy, as it permits ambulance officers to record people without their consent in certain circumstances; for example, if the ambulance officer believes there is a significant risk of harm to themselves or another person. Relevantly, ambulance officers are likely to interact with vulnerable members of the public – for example, those who are sick or injured. Further, it is unclear from the regulation how recordings captured by body worn surveillance devices will be stored, or for how long, or how they can be used.

However, the Committee acknowledges that the exemption is associated with a trial, and as such only some ambulance officers in NSW wear the surveillance devices. There are also safeguards accompanying the exemption, including that the exemption does not apply unless the ambulance officer informs a person that they might be recorded, or somebody may be at a significant risk of harm, or the recording is accidental. In addition, the Committee recognises the public interest in deterring violence and anti-social behaviour towards ambulance officers. In the circumstances, the Committee makes no further comment.

Part One – Bills

1. Appropriation Bill 2020; Appropriation (Parliament) Bill 2020; Payroll Tax Amendment Bill 2020 (cognate budget bills)

Date introduced	17 November 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

Appropriation Bill 2020

1. The object of this Bill is to appropriate from the Consolidated Fund various sums of money required during the 2020–21 financial year for the services of the Government, including—

   (a) Departments of the Public Service, and

   (b) various special offices.

2. The Consolidated Fund largely comprises receipts from, and payments out of, taxes, fines, some regulatory fees, Commonwealth grants and income from Crown assets.

3. This Bill—

   (a) appropriates a single sum for the services of each agency, including recurrent services, capital works and services, and debt repayment, and

   (b) contains an additional appropriation which allocates revenue raised in connection with gaming machine taxes to the Minister for Health and Medical Research for spending on health related services, and

   (c) contains provision for transfer payments from the Commonwealth to non-government schools and local government, and

   (d) provides for appropriation for the whole of the 2020–21 financial year.

Appropriation (Parliament) Bill 2020

4. The object of this Bill is to appropriate from the Consolidated Fund a sum for the services of the Legislature during the 2020–21 financial year, including recurrent services, capital works and services and debt repayment.

Payroll Tax Amendment Bill 2020

5. The object of this Bill is to amend the *Payroll Tax Act 2007* to modify the calculation of payroll tax payable by an employer.

BACKGROUND

6. These Bills give effect to the 2019-20 Budget.

7. Although they are separate Acts when operative, the Appropriation Bill 2020, Appropriation (Parliament) Bill 2020 and Payroll Tax Amendment Bill 2020 are cognate Bills. Therefore, all three Bills have been considered in the one report.

8. However, the Committee makes no comment on the Appropriation Bill 2020 and the Appropriation (Parliament) Bill 2020 in respect of the issues set out in section 8A of the Legislation Review Act 1987.

9. In the Second Reading Speech, the Treasurer noted that the budget was one of recovery and reform, particularly noting the significant challenges of the bushfires and COVID-19 pandemic on the State economy:

> Today we deliver a Budget to build on our response so far. A Budget to keep our people safe today and create the jobs we need right now. But a crisis doesn't change our ultimate responsibility of leaving this State a better place than we found it. So this is a Budget about recovery and reform – to forge a brighter future for our people. This Budget is our plan for a prosperous, post-pandemic NSW.

ISSUES CONSIDERED BY THE COMMITTEE

The Committee makes no comment on the Bill in respect of the issues set out in section 8A of the Legislation Review Act 1987.

2. Crimes (Domestic and Personal Violence) Amendment (Coercive and Controlling Behaviour) Bill 2020*

Date introduced	18 November 2020
House introduced	Legislative Council
Member responsible	Ms Abigail Boyd MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Crimes (Domestic and Personal Violence) Act 2007* to create an offence of engaging in abusive behaviour of another person within a domestic relationship

BACKGROUND

2. In the second reading speech, Ms Abigail Boyd MLC detailed multiple stories in which long term domestic abuse resulted in homicide, serving to illustrate the 'ongoing scourge of violence and murder of women in this country'. In particular, Ms Boyd highlighted the frequency with which such homicides occurred in or following 'relationships marked by dangerous patterns of controlling behaviour', called 'coercive control'.

3. Ms Boyd told Parliament that the *Crimes (Domestic and Personal Violence) Amendment (Coercive and Controlling Behaviour) Bill* 2020 'seeks to change the law to recognise coercive control as domestic abuse. By criminalising coercive control, we will have a fighting chance of preventing more murders like these.'

4. Ms Boyd further explained that the Bill establishes a new offence of 'abusive control' and provides for certain procedural and other protections in relation to that offence:

> The bill is largely modelled on the equivalent provisions introduced in Scotland in 2018. New section 14A sets out the new offence of abusive control, punishable with 10 years prison, or two years if dealt with summarily and/or 50 penalty units. These penalties are designed to reflect the severity of coercive control, recognising on the one hand the lifelong impact that coercive control can have on victims-survivors—which is often as harmful and debilitating as physical violence offences—while on the other hand, also ensuring access to justice through the local courts and acknowledging that high penalties can reduce the rates at which the offence will be prosecuted.

ISSUES CONSIDERED BY THE COMMITTEE

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Lack of certainty

5. Schedule 1 to the Bill seeks to insert two new sections, 14A and 14B, into the *Crimes (Domestic and Personal Violence) Act 2007.*

6. Proposed section 14A(1) creates a new offence of engaging in a course of abusive behaviour in a domestic relationship. As mentioned above, the offence would have a maximum penalty of imprisonment for 10 years, or 50 penalty units (a fine of approximately $5,500), or both.

7. Proposed section 14A(2)(a) defines abusive behaviour as behaviour that is violent, menacing or intimidating, or has, or is reasonably likely to have, one or more of the following effects:

- making the other person dependent on, or subordinate to, the person,
- isolating the other person from friends, relatives or other sources of support,
- controlling, regulating or monitoring the other person's day-to-day activities,
- depriving the other person of, or restricting the other person's, freedom of action,
- frightening, humiliating, degrading or punishing the other person.

8. Subsections 14A(2)(b) to (d) set out further requirements for the offence, that:

- the person engaging in the course of behaviour intends to cause, or is reckless as to whether the course of behaviour causes the other person to suffer physical, emotional or psychological harm, including fear, alarm or distress, and
- the abusive behaviour occurs on two or more occasions, and
- a reasonable person would consider the course of behaviour to be likely to cause the other person to suffer physical, emotional or psychological harm, including fear, alarm or distress.

9. Section 14A(3) provides that abusive behaviour by one person to another may include conduct directed at a third person (e.g. a child), the other person's property, or a companion animal.

10. Section 14A(4) further notes that abusive behaviour may include control of a person's finances or a restriction on access to financial or economic resources.

11. Section 14B does not add to the offence, but provides that the Minister is to periodically review the offence to determine whether its policy objectives remain valid, and whether its terms remain appropriate for securing those objectives. Those reviews are to be undertaken 3 years from the date of assent to the Bill, and then once every 3 to 5 years.

Schedule 1 to the Bill seeks to insert a new section 14A into the *Crimes (Domestic and Personal Violence) Act 2007*, making it an offence for a person to engage in behaviour that is 'abusive' of another person with whom the person has, or has had, a domestic relationship.

Proposed section 14A(2) of the Bill defines 'abusive' behaviour broadly to include conduct that has, or is reasonably likely to have, certain effects including 'making the other person dependent on, or subordinate to, the person'; 'controlling, regulating or monitoring the other person's day to day activities'; 'depriving the other person of or restricting the other person's freedom of action'; and 'frightening, humiliating, degrading or punishing the other person'. The Committee notes that the language used in this definition may be perceived by some as quite broad.

The Committee generally prefers offence provisions, particularly those with potential terms of imprisonment attached, to be drafted with sufficient specificity so that their scope and content is clear. This enables people to have a clear idea of the behaviour outlawed so that they may regulate their own behaviour accordingly.

The Committee acknowledges that the Bill aims to reduce rates of domestic abuse, and to recognise the severe effects that coercive control can have on victims. The Committee also notes the provision made in section 14B for the Minister to undertake periodic reviews of the Act, to determine whether its terms 'remain appropriate' for securing its objectives. However, the Committee refers the Bill to Parliament to consider whether the broadly defined new offence, in its current form, would impact on principles of legal certainty.

Retrospectivity

12. In the second reading speech, Ms Abigail Boyd MLC noted that, '[a]lthough the bill will not have retroactive effect, new section 14A(8) of the bill will allow instances of behaviour occurring prior to implementation of the bill's provisions to be considered within a course of behaviour where at least one instance of that behaviour occurs after implementation.'

13. Accordingly, section 14A(8) provides that the offence 'extends to a course of behaviour that began before the commencement of this section, but only if the behaviour occurred on at least one occasion after the commencement'.

Section 14A(8) provides that the domestic abuse offence in section 14A(1) extends to a course of behaviour that began before the commencement of the section, provided the behaviour occurred on at least one occasion after the commencement. This means that the offence in section 14A effectively captures behaviour that occurred prior to its introduction, so that the offence has partial retrospective effect.

The Committee will usually comment about retrospectivity as it runs counter to the rule of law principle that a person is entitled to know the law that applies to him or her at any given time.

While this provision does make behaviour occurring prior to its introduction liable to punishment, this can only occur where the behaviour continued after the offence came into force. The Committee also acknowledges that the objective of the Bill is to recognise the repeated nature of abusive conduct in domestic relationships, and the cumulative effect this has on its victims. However, as the provision seeks to act retrospectively, and attaches a criminal penalty, the Committee refers the Bill to the Parliament for its consideration.

Reversal of onus of proof

14. In proceedings for an offence under proposed section 14A, section 14A(6) provides that there is a 'rebuttable presumption' that the accused person has or has had a domestic relationship with the other person. Subsection (7) provides that this presumption is rebuttable by proof on the balance of probabilities.

15. The second reading speech justifies this provision as follows:

> Put simply, behaviour that has met all elements of the offence should result in a finding of an offence of abusive control and should not be excused on the basis of a technicality arising from the definition of "domestic relationship" under section 5 of the *Crimes (Domestic and Personal Violence) Act*, which in any event is currently drafted extremely broadly and would be highly unlikely to provide any wriggle room for an offender under these new provisions. Accordingly, the complainant and the court's time should not be wasted arguing over whether or not a domestic relationship exists for the purposes of proving this offence.

Section 14A(6) provides for a presumption, rebuttable on the balance of probabilities, that an accused person has or has had a domestic relationship with their alleged victim. In effect, this provision reverses the onus of proof for one element of the offence in section 14A(1).

This provision may impact the defendant's right to a fair trial, including the right to be presumed innocent unless guilt is proved beyond reasonable doubt.

The Committee notes the justification provided for this provision in the second reading speech, that the court's time should not be wasted arguing over the 'technicality' of whether or not a domestic relationship exists. The Committee also acknowledges, as the second reading speech suggests, that the definition of a 'domestic relationship' in the *Crimes (Domestic and Personal Violence) Act 2007* is broad.

However, the Committee refers this matter to Parliament to consider whether the reversed onus in subsection 14A(6) has an undue impact on prospective defendants' right to a fair trial.

Part Two – Regulations

1. Electricity Supply Amendment (Energy Saving) Amendment Regulation 2020

Date tabled	LA: 9 February 2021 LC: TBA
Disallowance date	LA: 11May 2021 LC: TBA
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy and Environment

PURPOSE AND DESCRIPTION

1. The object of the *Electricity Supply Amendment (Energy Savings) Regulation 2020* is to amend Schedule 5 to the *Electricity Supply Act 1995* to change the existing energy savings scheme targets for the years 2022 to 2025 and set targets for the years 2026 to 2050.

2. This Regulation is made under the *Electricity Supply Act 1995*, including section 191 (the general regulation-making power) and clauses 7 and 8A of Schedule 4A.

ISSUES CONSIDERED BY THE COMMITTEE

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Henry VIII clause

3. The Regulation amends the *Electricity Supply Act 1995* by increasing the energy savings scheme targets for 2022 to 2025 and setting targets for the following years up to 2050.

4. This amendment is made possible by a Henry VIII clause in the Act. A Henry VIII clause is a clause of an Act that enables the Act to be amended by subordinate legislation.

5. Specifically, clauses 7 and 8A of Schedule 4A to the Act provide for the Minister to recommend that a regulation be made to change the energy savings scheme target for a specified year or years, if the Minister is satisfied that the change is appropriate for one of a range of reasons.

> **The *Electricity Supply Amendment (Energy Savings) Regulation 2020* amends the *Electricity Supply Act 1995,* made possible by a Henry VIII clause in the Act. This is an inappropriate delegation of legislative power. Primary legislation should not be changed by subordinate legislation because it reduces parliamentary scrutiny of those changes.**

Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987),* the statutory rule may have already been in operation for some time before disallowance occurs.[1]

The Committee refers this matter to Parliament for further consideration.

[1] See discussion of Henry VIII Clauses in ACT Standing Committee on Justice and Community Safety, 'Henry VIII FactSheet' November 2011 at https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

2. Electricity Supply (General) Amendment (Remote De-energisation and Re-energisation) Regulation (No 3) 2020

Date tabled	LA: 13 October 2020 LC: 13 October 2020
Disallowance date	LA: 16 February 2021 LC: 26 November 2020
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy and Environment

PURPOSE AND DESCRIPTION

1. The object of the *Electricity Supply (General) Amendment (Remote De-energisation and Re-energisation) Regulation (No 3) 2020* (the Regulation) is to enable retailers to arrange, and metering providers to carry out, connection and disconnection of the premises of small customers (premises) by the remote use of an electricity meter.

2. This Regulation makes provision for the following—

    a) requests for, and carrying out of, the remote de-energisation and remote re-energisation of premises,

    b) the payment of compensation for failure to re-energise premises within a specified time,

    c) offences relating to remote re-energisation and de-energisation of premises.

3. This Regulation is made under *the Electricity Supply Act 1995*, including section 191 (the general regulation-making power).

4. A public consultation paper prepared by the NSW Department of Planning, Industry and Environment in August 2019 (Consultation Paper)[2] noted that remote re-energisation and de-energisation was prohibited until June 2020, but that the shift to digital meters – which enables remote re-energisation and de-energisation - had several benefits.

5. The prohibition on remote re-energisation and de-energisation referred to in the Consultation Paper was extended out to 1 October 2020.[3] However, as at the date of this report, remote energising, de-energising and re-energising is now available to energy retailers.

[2] NSW Department of Planning, Industry and Environment, August 2019, *Digital metering: Improving service delivery in NSW*, https://energy.nsw.gov.au/media/1826/download, viewed 21 October 2020.

[3] See the now repealed clause 8A of the *Electricity Supply (General) Regulation 2014* as inserted by *the Electricity Supply (General) Amendment (Remote De-energisation and Re-energisation) Regulation (No 2) 2020*.

ISSUES CONSIDERED BY THE COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Strict Liability offences and large penalities

6. The Regulation introduces a number of strict liability offences which may be committed by both energy retailers and metering providers in failing to complete certain tasks related to remote energisation, de-energisation or re-energisation quickly enough when dealing with small customers.

7. Relevantly, section 5(2)(a)-(b) of the *National Energy Retail Law (NSW)* (NERL) states that a small customer is a customer:

   a) who is a residential customer; or

   b) who is a business customer who consumes energy at business premises below the upper consumption threshold.

8. A retailer is defined under section 2 of the NERL as a person who holds a retailer authorisation under Part 5 of the NERL.

9. Remote de-energisation or re-energisation is the service of energy providers disconnecting or connecting a property to electrical power without a technician having to physically visit the home or building. This is enabled by smart meter technology.

10. The Regulation amends the *Electricity Supply (General) Regulation 2014* by inserting a number of offences where there is a failure by a retailer to take steps to ensure a metering provider carries out remote energisation or re-energisation of a small customer's premises within a certain time frame: see clauses 10B(1) – (2) of the Regulation. For example, if a customer's request is made before 3pm, the energisation/re-energisation must occur on the next business day. Failure to do so is an offence with a maximum penalty of 1,000 penalty units for a corporation or 500 for an individual (approximately $110,000 and $55,000 respectively).

11. The Regulation also introduces an offence carrying a maximum penalty of 10 penalty units where a retailer fails to provide a statement or notice under clause 38D(2) of the *Gas and Electricity (Consumer Safety) Regulation 2018* to a small customer on or before the time and date remote re-energising is due to take place.

12. The Regulation passes liability down-line to a metering provider if a retailer requests a metering provider to remotely energise or re-energise premises in response to a request by a small customer. If the metering provider fails to remotely re-energise premises by the end of the day as required in the above provisions, then the metering provider will be liable for a maximum penalty of 1,000 penalty units for a corporation (approximately $110,000) or 500 penalty units for an individual (approximately $55,000): clause 10C of the Regulation.

13. There are also offences associated with delaying the de-energisation of a small customer's premises, albeit with a slightly longer allowable time period; for example, see clause 10E. The maximum penalty for breaching clause 10E is 1,000 penalty units for

a corporation or 500 penalty units for an individual (approximately $110,000 and $55,000 respectively).

14. An offence has also been created in instances where a retailer remotely de-energises a small customer's premises, with a maximum penalty of 10 penalty units: clause 10F.

15. The final offence introduced prevents exempt sellers from requesting, arranging or carrying out a remote de-energising and re-energising premises of small customers. This offence carries a maximum penalty of 1,000 penalty units for a corporation or 500 for an individual (approximately $110,000 and $55,000 respectively). The Australian Energy Regulator publishes a list of exempt sellers, which often includes retirement villages, caravan parks and persons selling energy at no profit or as a community service.[4]

> **The *Electricity Supply (General) Amendment (Remote De-energisation and Re-energisation) Regulation (No 3) 2020* introduces a number of strict liability offences which may be committed by both energy retailers and metering providers in failing to complete certain tasks related to remotely energising, re-energising or de-energising small customers' premises quickly enough. For example, a retailer must ensure steps are taken for a small customers' remote energisation to take place on the next business day after the request is made by the customer, provided that request is made before 3pm. Similar duties rest with metering providers who have been instructed to action remote energisation, re-energisation or de-energisation.**
>
> **The Committee notes that the offences created by the Regulation are of strict liability. The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence. That is, the retailer or metering provider need not intend for a small customers' re-energising to occur any later than the business day after their request in order for the relevant retailer or metering provider to be held liable for a penalty.**
>
> **The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the offence provision is designed to proactively prevent any costly delays in connecting or disconnecting small customers to or from power. Further, the maximum penalties for the offences are monetary, not custodial. The Regulation has also been drafted following a public consultation process conducted by the NSW Department of Planning, Industry & Environment. In these circumstances, the Committee makes no further comment.**

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Adverse impact of energy retailers

16. As set out in more detail above, the Regulation introduces a number of strict liability offences which may be committed by both energy retailers and metering providers in failing to complete certain tasks related to remote energisation, de-energisation or re-

[4] See s 119 of the National Energy Retail Law (NSW); Australian Energy Regulator, undated, *Retail Exemptions*' <https://www.aer.gov.au/retail-markets/retail-exemptions>, viewed 21 October 2020.

energisation quickly enough when dealing with small customers. For example, see clauses 10B(1) – (2) of the Regulation.

17. The Regulation also requires an energy retailer to both notify the distributor of any remote de-energisation as required by the distributor, and metering providers are required to remotely de-energise a small customer's premises within 2 business days of receiving the request from the customer, else the same maximum penalty of 1000 penalty units for a corporation and 500 for an individual will be payable (approximately $110,000 and $55,000 respectively).

The Regulation introduces a number of strict liability offences which may be committed by both energy retailers and metering providers in failing to complete certain tasks related to remote energisation, de-energisation or re-energisation quickly enough when dealing with small customers. The significant penalties associated with these offences may adversely impact on energy businesses. For example, energy retailers and metering providers will need to be able to adapt and act quickly to action customers' requests when remotely energising, de-energising or re-energising small customers' premises. If one connection is delayed for a day, it could result in penalties of up to $110,000 per incident of delay plus compensation to the customer.

However, given remote energisation has been prohibited for some time to allow for public consultation process to take place, energy businesses are likely to already have appropriate practices and systems in place to quickly respond to remote energisation requests. The innate nature of remote energisation also lends itself to being actionable quickly without the delays associated with physical site visits. In these circumstances, the Committee makes no further comment.

3. Fisheries Management (Possession Limit) (Estuary Cockles) Order 2020

Date tabled	LA: 20 October 2020 LC: 20 October 2020
Disallowance date	LA: 16 March 2021 LC: 17 March 2021
Minister responsible	The Hon. Adam Marshall MP
Portfolio	Agriculture and Western New South Wales

PURPOSE AND DESCRIPTION

1. The *Fisheries Management (Possession Limit) (Estuary Cockles) Order 2020* (Order) is made under section 17C of the *Fisheries Management Act 1994* (Act) and will remain in force for 5 years from the date of publication.

2. The Order alters possession limits relating to estuary cockles, otherwise provided for in Schedule 1 of the *Fisheries Management (General) Regulation 2019*.

ISSUES CONSIDERED BY THE COMMITTEE

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Reduced possession limits with substantial penalties

3. The Order creates a tighter possession limit for estuary cockles, which applies to a person in possession of cockles in, on or adjacent to any waters, or transporting or storing cockles elsewhere.

4. As noted in the Order, the *Fisheries Management (General) Regulation 2019* imposes a possession limit for cockles, pipis and blue mussels of 50, comprised wholly or partly of each species. This Order limits the maximum quantity of cockles that can be in a person's possession to only 20, whether in combination with other species or not.

5. As provided in section 17B of the Act, where there is an inconsistency between the possession limits imposed by the regulations and by Ministerial order, the limit imposed by Ministerial order prevails.

6. Under section 18 of the Act, contravention of a possession limit is an offence with a maximum penalty of 1,000 penalty units ($110,000) for a corporation, and 200 penalty units ($22,000) or imprisonment for 6 months (or both) for an individual. For a second or subsequent offence, the maximum penalty for an individual or corporation is double.

7. The overarching object of the Act is 'to conserve, develop and share the fishery resources of the State for the benefit of present and future generations'. More specifically, the objects include 'to conserve fish stocks and key fish habitats', 'to

promote viable commercial fishing and aquaculture industries', and 'to appropriately share fisheries resources between the users of those resources'.

The *Fisheries Management (Possession Limit) (Estuary Cockles) Order 2020* reduces the possession limit for cockles from 50 to 20. The Order may have an adverse effect on commercial fishing operators, particularly as the penalty for contravening a possession limit is substantial for both corporations and individuals. The maximum penalty under the Act for breaching the possession limit is $110,000 for corporations and $22,000 for individuals or 6 months' imprisonment, or both. However, the Committee notes the conservation objects of the *Fisheries Management Act 1994*, under which the Order is made, and the fact that a possession limit of 50 cockles previously existed. Accordingly, the Committee makes no further comment.

4. Gas and Electricity (Consumer Safety) Amendment (Medical Gas Work) Regulation (No 2) 2020

Date tabled	LA: 10 November 2020 LC: 10 November 2020
Disallowance date	LA: 23 March 2021 LC: 24 March 2021
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Gas and Electricity (Consumer Safety) Regulation 2018* in connection with the enactment of the *Gas Legislation Amendment (Medical Gas Systems) Act 2020.*

2. This Regulation is made under the *Gas and Electricity (Consumer Safety) Act 2017*, including the definitions of medical facility and medical gas in section 4(1) and sections 38A(1)(a), 38B(1)(a), 38E(a), 40(1)(b) and (2), 42(c), 54(3), 66 and 75 (the general regulation-making power).

3. This Regulation underwent a consultation process from 3 September 2020 to 27 September 2020, led by NSW Fair Trading.[5]

ISSUES CONSIDERED BY THE COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

New and strict liability offences

4. The Regulation introduces several new strict liability offences, some with significant maximum penalties.

5. Tradespeople who were previously conducting (or supervising) medical gas fitting work, or medical gas work, generally did not require an 'authority number' under the *Gas and Electricity (Consumer Safety) Regulation 2018* (2018 Regulation). Under the *Gas and Electricity (Consumer Safety) Amendment (Medical Gas Work) Regulation (No 2) 2020* (Regulation) those workers now require an authority number.

6. Proposed clause 69A states that all work must be done in accordance with the requirements of:

[5] NSW Fair Trading, *Regulation amendments for Medical Gas Work,* https://www.fairtrading.nsw.gov.au/consultation-tool/regulation-amendments-for-medical-gas-work

i. AS 2896—2011, *(Medical gas systems—Installation and testing of non-flammable medical gas pipeline systems after the completion of the work)*; and

ii. AS 4774.2:2019, *(Work in compressed air and hyperbaric facilities— Hyperbaric oxygen facilities)*

7. Failure to comply with clause 69A will result in an offence under section 38A(1)(a) of the *Gas and Electricity (Consumer Safety) Act 2017* (Act). That section provides that there is a maximum penalty in the case of an individual of 500 penalty units for a first offence (approximately $55,000), or 750 penalty units (approximately $82,500) or imprisonment for 2 years (or both), for a second or subsequent offence. A corporation similarly attracts a maximum penalty of 5,000 penalty units for a first offence or 7,500 penalty units for a subsequent offence (approximately $550,000 or $825,000 respectively).

8. Proposed clause 69D provides that:

i. a person must not carry out a safety and compliance test on medical gasfitting work, medical gas technician work or mechanical services and medical gas work on a medical gas installation, or part of a medical gas installation, if the person is not a qualified person. Failure to do so carries a maximum penalty of 200 penalty units; and

ii. a work provider, within the meaning of clause 69C(3)(c)(ii), must not cause or permit an employee, agent or contractor of the provider to carry out a safety and compliance test on the work concerned unless the employee, agent or contractor is a qualified person.

9. Failure to comply with clause 69D also carries a maximum penalty of 500 penalty units for a corporation and 200 penalty units for an individual.

10. Proposed clause 72A introduces a process of rectifying non-compliant electrical installation, gasfitting, mechanical services, medical gas and medical gasfitting work. An authorised officer may issue the responsible contractor with a notice to rectify the non-compliant work within a specified period. Notices may attach certain conditions to the work but may only be issued within 2 years of the work being completed. A responsible contractor to which a notice may be issued is a contractor who completes the whole of the work that the contractor was engaged to carry out. Failure to rectify the work as specified without a reasonable excuse carries a maximum penalty of 100 penalty units and, for a continuing offence, a further penalty of 50 penalty units for each day the offence continues. Penalty notices may be issued for $2,200 and for a continuing offence, an additional $1,100 for each additional day the offence continues.

The Regulation introduces a number of new strict liability offences for contravening requirements in the Regulation with respect to performing or supervising medical gasfitting work, medical gas technician work and the safety and compliance test testing of medical gas systems. Some of these have substantial maximum penalties. The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence.

However, strict liability offences are not uncommon in regulatory settings to encourage compliance. The Committee acknowledges that the increased regulatory requirements with respect to medical gas systems are intended to recognise those systems as critically important in preserving life, and to protect public safety. Further, the Regulation has undergone a consultation period during September 2020. In addition, proposed clauses 69B-69D (relating to safety and compliance testing penalties) do not commence until 1 May 2021, allowing for a staged implementation giving the business community an opportunity to familiarise itself with the new provisions. In the circumstances, the Committee makes no further comment.

5. Gas and Electricity (Consumer Safety) Amendment (Remote De-energisation and Re-energisation) Regulation 2020

Date tabled	LA: 13 October 2020 LC: 13 October 2020
Disallowance date	LA: 16 February 2021 LC: 26 November 2020
Minister responsible	The Hon Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of the *Gas and Electricity (Consumer Safety) Amendment (Remote De-energisation and Re-energisation) Regulation 2020* (**Regulation**) is to enable retailers to arrange, and metering providers to carry out, connection and disconnection of the premises of small customers (premises) by the remote use of an electricity meter. In particular, this Regulation makes provision for the following—

   a) the preparation of remote de-energisation and remote re-energisation plans,

   b) the audit of remote de-energisation and remote re-energisation plans to ensure that the plans provide for the safe remote de-energisation and remote re-energisation of premises,

   c) arrangements for, and carrying out of, the remote de-energisation and remote re-energisation of premises in accordance with a plan.

2. This Regulation amends the *Gas and Electricity (Consumer Safety) Regulation 2018* and is made under the *Gas and Electricity (Consumer Safety) Act 2017*, including sections 34(a) and 75 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Strict liability offences with large penalties

3. Section 34 of the *Gas and Electricity (Consumer Safety) Act 2017* (**Act**) provides that a person must not carry out electricity installation work, gasfitting work, or certain autogas work other than in accordance with the requirements prescribed by the regulations for the purposes of the section.

4. This Regulation prescribes standards and requirements for the purposes of section 34. For instance, schedule 1 of the Regulation contains proposed clause 38B which provides

that a metering provider must not remotely de-energise or remotely re-energise premises without a safety management and technical procedures plan. The remote de-energisation or re-energisation must be undertaken in accordance with the plans.

5. Remote de-energisation or re-energisation is the service of energy providers disconnecting or connecting a property to gas or electrical power without a technician having to physically visit the home or building. This is enabled by smart meter technology.

6. Failure to comply results in a strict liability offence under section 34 of the Act which carries a maximum penalty, in the case of an individual, of 500 penalty units for a first offence, or 750 penalty units (approximately $55,000 or $82,500) or imprisonment for 2 years, or both, for a second or subsequent offence. For a corporation, the maximum penalty is 5,000 penalty units for a first offence, or 7,500 penalty units for a second or subsequent offence (approximately $550,000 and $825,000).

7. The requirements of a proposed plan are set out in proposed clause 38E of the Regulation. Proposed plans may be sent to the Secretary (being the Commissioner for Fair Trading, Department of Finance, Services and Innovation) who will assess whether the plan is in compliance with the new Part 9A of the *Gas and Electricity (Consumer Safety) Regulation 2018*. Subclauses 38E(1)-(2) provide for the requirements of proposed plans, which include safety and customer procedures to be followed and the risk assessment which must be undertaken.

8. The Regulation also creates a new standalone offence in proposed clause 38C which provides that a retailer must not remotely de-energise or re-energise premises without a safety management and customer procedures plan in force. The maximum penalty is 500 penalty units for a corporation (approximately $55,000) or 250 penalty units (approximately $27,500) for an individual.

9. NSW Fair Trading has prepared guidelines[6] which assist retailers and metering providers in preparing, submitting and amending (if necessary) plans for the safe remote de-energisation and remote re-energisation of premises.

The Regulation introduces two new strict liability offences. The first is derived from section 34 of the *Gas and Electricity (Consumer Safety) Act 2017* which requires any electrical installation, gasfitting, or autogas work to be done in accordance with the standards or requirements (if any) prescribed by the regulations. This Regulation requires, for the purposes of section 34 of the Act, that all electrical installation work that is remote de-energisation or remote re-energisation of premises be done by a metering provider who has a safety management and technical procedures plan in force, carries out the remote de-energisation or remote re-energisation in accordance with the plan, and has received a request from a retailer for the remote de-energisation or remote re-energisation of the premises. Penalties for this offence, which are set out in the Act, are financially significant, and repeated offences may result in a custodial sentence.

[6] NSW Fair Trading ''Guidelines for Development of Safety Management Plans for Remote De-energisation and Re-energisation of Small Customers Premises by Electricity Retailers and Metering Providers', September 2020, Accessed 22 October 2020, <https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0003/910380/Guidelines-for-Development-of-Safety-Management-Plans-for-Remote-De-energisation-and-Re-energisation.pdf>

The second offence requires a retailer to have a safety management and customer procedures plan in force and comply with that plan before arranging the remote de-energisation or remote re-energisation of premises with a metering provider. This offence does not involve a potential custodial sentence but still involves a significant maximum penalty of approximately $27,000 for an individual and $55,000 for a corporation.

The Committee also notes that both of the offences created by the Regulation are of strict liability. The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence. That is, offending retailers need not intend for de-energisation or re-energisation to occur without a safety management and customer procedure plan in place or intend for any de-energisation or re-energisation to occur in any way inconsistent with those plans for that retailer to incur a penalty.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the offence provisions are designed to ensure safety management and customer procedure plans are in place before any remote de-energisation or re-energisation occurs at the behest of either energy retailers or metering providers. The maximum penalties for the failure to comply with clause 38B of the Regulation are significant, including a maximum penalty of 2 years imprisonment or $750,000 for corporations in the event of repeated offences. However, these penalties are set out in section 34 of the Act, rather than the Regulation. Also, the higher penalties are only incurred by repeat offenders, and guidance material has been provided on how to successfully develop and implement safety management plans. In the circumstances, the Committee makes no further comment.

6. Gas Supply (Safety and Network Management) Amendment (Hydrogen Gas) Regulation 2020

Date tabled	LA: 9 February 2021 LC: TBA
Disallowance date	LA: 11 May 2021 LC: TBA
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy and Environment

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are to amend the *Gas Supply (Safety and Network Management) Regulation 2013* to—

   (a) declare certain gases to be gases for the purposes of the Act, and

   (b) prescribe those gases as gases in respect of which a distribution system must not be operated without a distributor's licence.

2. Those gases are hydrogen gas that has not been mixed with any other gas and a mixture of hydrogen gas and another gas to which the *Gas Supply Act 1996 applies*.

3. This Regulation is made under the *Gas Supply Act 1996*, including sections 34 and 83 (the general regulation-making power) and paragraph (c) of the definition of 'gas' in the Dictionary.

4. The Committee also notes that this amendment is in line with recommendations made in a report published by the COAG Energy Council in 2019, aimed at facilitating the injection of up to 10% hydrogen into existing natural gas distribution networks around Australia.[7]

ISSUES CONSIDERED BY THE COMMITTEE

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Additional categories of gas for which distributor's licence is required

5. Clause 37A of the Regulation specifies two new types of gas for which a distribution licence is required in order to operate a distribution system –

[7] COAG Energy Council, 'Hydrogen in the Gas Distribution Networks: A kickstart project as an input into the development of a National Hydrogen Strategy for Australia', http://www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/nhs-hydrogen-in-the-gas-distribution-networks-report-2019_0.pdf

a) hydrogen gas that is not mixed with any other gas, and

b) a mixture of hydrogen gas and another gas to which the Act applies.

6. Under section 34 of the *Gas Supply Act 1996*, distributing a type of gas prescribed by the regulations without a licence attracts a maximum penalty of 500 penalty units for a corporation, and 50 penalty units in any other case.

7. Pursuant to section 36 of the Act, applications for distribution licences are made to the Independent Pricing and Regulatory Tribunal and must be accompanied by a fee determined by the Minister. The current application fee is set at $1,500.[8]

8. Pursuant to section 44, annual licence fees also apply, and are set by the Minister. In practice, those fees vary based on the Treasurer's estimate of the cost incurred by the State in relation to each licence holder.[9]

9. Applications for licences require a process of public consultation (section 37), and may be refused on various grounds including 'such grounds as the Minister considers relevant' (section 38). The Act provides that the Minister must endeavour to determine a licence application within 6 months.

The *Gas Supply (Safety and Network Management) Amendment (Hydrogen Gas) Regulation 2020* prescribes additional types of gas which now require a distributor's licence. For example, clause 37A of the Regulation prescribes pure hydrogen gas and hydrogen gas mixtures as types of gas that will now require a licence. Operating a distribution system to convey those gases without such a licence attracts a maximum penalty of 500 penalty units ($5,500) for a corporation, and 50 penalty units ($55,000) in any other case.

Applications for a distributor's licence attract a fee, as determined by the Minister; may take up to 6 months (or more in some circumstances) to process; and may be refused by the Minister on a variety of grounds. Ongoing licence fees, also determined by the Minister, are incurred on a yearly basis.

This may create an additional administrative burden for businesses already operating hydrogen gas distribution systems in New South Wales. Non-compliance with the provision by a corporation may also attract significant penalties.

However, the Committee notes that the amendment is in line with recommendations made by the COAG Energy Council, and appears to be part of a broader strategy to increase the use of hydrogen gas as a form of renewable energy. In the circumstances, the Committee makes no further comment.

[8] Australian Business Licence and Information Service, 'Gas Distributor's Licence – New South Wales', https://ablis.business.gov.au/service/nsw/gas-distributors-licence/36144

[9] Independent Pricing and Regulatory Tribunal, 'Licence fees', https://www.ipart.nsw.gov.au/Home/Industries/Energy/Energy-Networks-Safety-Reliability-and-Compliance/Licence-fees

7. Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 3) 2020

Date tabled	LA: 13 October 2020 LC: 13 October 2020
Disallowance date	LA: 16 February 2021 LC: 26 November 2020
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 3) 2020* (Regulation) is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction under the *Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020* about intentionally spitting or coughing on a public official or other worker in a way that is likely to cause fear about the spread of COVID-19.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (the general regulation-making power).

3. The Committee has previously commented on the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* and the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 2) 2020* in its Digests No 13/57 and 17/57. These regulations implemented the original *Public Health (COVID-19 Spitting and Coughing) Order 2020,* which commenced on 9 April 2020 and its successor, *the Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020*, which commenced on 29 June 2020.. Both of these existing orders have been automatically repealed.

ISSUES CONSIDERED BY THE COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Penalty notice offences – right to fair trial

4. The *Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020* (Order), which commenced on 25 September 2020, directs that a person must not intentionally spit at or cough on public officials or other workers in a way that is likely to cause fear about the spread of COVID-19. The Order will be automatically repealed on 18 December 2020.

5. The Regulation provides that a breach of the Order will result in a penalty notice of $5,000. This is consistent with the penalties which applied to previous versions of the Order, which have since expired.

6. Under subsections 7(1) and (2) of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research (the Minister) considers on reasonable grounds that there is, or is likely to be, a risk to public health, the Minister may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.

7. Under subsection 7(4) of the Act, such an order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order. Under subsection 7(5) of the Act, such an order expires 90 days after it is made unless earlier revoked, or unless an earlier day is specified in the order.

8. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction.

> ***The Public Health (COVID-19 Spitting and Coughing) Regulation (No 3) 2020*** **allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.**
>
> **In its Digests No 13/57 and Digest 17/57, the Committee commented on previous regulations which also provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order, both of which have now expired.**
>
> **Consistent with those comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.**
>
> **However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.**

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Matters that should be included in primary legislation

9. As above, the Regulation allows for a $5,000 penalty notice to be issued for a contravention of the Ministerial direction under clause 5 of the Order; that is, when an individual intentionally spits or coughs on:

- a public official or
- another worker while the worker is at the worker's place of work or travelling to or from it,

in a way that is likely to cause fear about the spread of COVID-19.

The Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 3) 2020 **allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.**

In its Digests No 13/57 and Digest 17/57, the Committee commented on a previous regulation which also provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order, both of which have now expired.

Consistent with those comments, the Committee identifies that it generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

8. Residential Tenancies Amendment (COVID-19) (No. 2) Regulation 2020

Date tabled	LA: 13 October 2020 LC: 13 October 2020
Disallowance date	LA: 16 February 2021 LC: 26 November 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are to—

(a) repeal and remake, with amendments, Part 6A of the *Residential Tenancies Regulation 2019* and Part 5 of the *Boarding Houses Regulation 2013* in relation to—

(i) the termination of certain residential tenancy agreements, and

(ii) the listing of certain tenants on a residential tenancy database for the non-payment of rent or charges, and

(iii) the eviction of certain residents from boarding houses, and

(b) prescribe the repeal of Part 13 of the *Residential Tenancies Act 2010* on 26 March 2021,[10] and

(c) make provisions of a savings and transitional nature consequent on the repeal of Part 6A of the *Residential Tenancies Regulation 2019*.

2. This Regulation is made under the *Residential Tenancies Act 2010*, including sections 224 (the general regulation-making power), 229(1) and 230(b).

[10] Schedule 1.28, item 2 of the *COVID-19 (Emergency Measures – Miscellaneous) Bill 2020* provided that Part 13 of the *Residential Tenancies Act 2010* would be repealed on a day prescribed by the regulations no later than 26 March 2021. The Committee published its report on this Bill, including some of the proposed amendments to Part 13, in Digest No 15/57 dated 2 June 2020.

ISSUES CONSIDERED BY THE COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Retrospectivity and property rights

3. The Regulation repeals and remakes, with amendments, Part 6A of the *Residential Tenancies Regulation 2019* and Part 5 of the *Boarding Houses Regulation 2013*. These Parts regulate matters such as the termination of residential tenancy agreements and boarding house tenancies.

4. In its comments on the original Parts 6A and 5 in Digest 14/57, the Committee noted that these measures would only run for 6 months. This is because section 229(4) of the *Residential Tenancies Act 2010* provides that certain regulations made under the Act and the *Boarding Houses Act 2012* for the purposes of the COVID-19 pandemic generally expire 6 months after they commence.

5. This Regulation further extends the operation of these measures out to 26 March 2021 (with amendments as outlined below).

6. Clause 41B(1) of the Regulation, for the period ending 26 March 2021 prevents a landlord under a residential tenancy agreement (other than a social housing tenancy agreement) from:

    a) giving an "impacted tenant" a termination notice under the Act for non-payment of rent or charges, or

    b) applying to NSW Civil and Administrative Tribunal (NCAT) under the Act for a termination order relating to a termination notice given to an impacted tenant for non-payment of rent or charges, or

    c) otherwise applying to NCAT for a termination order in relation to the residential tenancy agreement solely on the ground that an impacted tenant has failed to pay rent or charges .

7. However, under new clause 41B(2), a landlord may give a termination notice or apply for a termination order that the landlord is otherwise prohibited from giving or applying for under clause 41B(1) above if—

    a) the landlord has participated, in good faith, in a formal rent negotiation process with the impacted tenant, and

    b) it is fair and reasonable in the circumstances for the landlord to give the termination notice or apply for the order.

8. An "impacted tenant" is defined as a tenant who is a member of a household impacted by the COVID-19 pandemic (schedule 1, clause 41A). Section 228A of the Act provides that, broadly, a household has been impacted by COVID-19 if one or more rent-paying members of the household have lost employment or income, had reduced work hours, or had to stop working because of a COVID-19 illness. The household income must also have been reduced by at least 25%.

9. In deciding whether the landlord has participated in good faith, and that the termination notice is fair and reasonable in the circumstances, NCAT may have regard to a number of factors including whether the landlord or impacted tenant refused to make or accept reasonable rent offers; whether the impacted tenant continued to pay some rent; and the nature of any financial hardship.

10. The Regulation also covers boarding houses by amending the *Boarding Houses Regulation 2013*.

11. In Schedule 2 of the Regulation, new clause 34 provides that before 26 March 2021, the minimum period of written notice the proprietor of a boarding house must give a resident financially impacted by the COVID-19 pandemic (an "impacted resident") of an eviction based solely on the non-payment of fees is as follows:

    a) if the proprietor and impacted resident have participated in negotiations about the fees but were not able to reach agreement because the impacted resident did not participate in good faith, 60 days, or

    b) otherwise, 6 months.

12. Under the Regulation, "impacted resident" has a similar meaning to "impacted tenant".

13. Schedule 2 of the Regulation also requires proprietors to give residents at least 90 days' written notice before eviction. There are exceptions, namely those contained in proposed clause 35 of the Boarding House Regulation. The proprietor need not give a resident 90 days written notice if the proprietor is evicting the resident on an "excluded ground," including if:

    a) the resident has not paid residency fees payable under the occupancy agreement, but only if the resident is not an impacted resident,

    b) the resident has intentionally or recklessly caused or permitted serious damage to the premises or other residents' property,

    c) the resident is using the premises for illegal purposes,

    d) the resident has threatened, abused, intimidated or harassed other residents or the proprietor.

    The Residential Tenancies Amendment (COVID-19) (No 2) Regulation 2020 **extends, with amendments, the operation of Part 6A of the Residential Tenancies Regulation 2019 and Part 5 of the Boarding Houses Regulation 2013 until 26 March 2021.**

    The Regulation limits certain rights of landlords and boarding house proprietors in response to the pandemic. For example, a landlord generally cannot evict a tenant who is financially impacted by COVID-19 for non-payment of rent. An exception exists where the landlord has negotiated in good faith and the termination notice is fair and reasonable in the circumstances.

A boarding house proprietor must also generally give 6 months' notice of a proposed eviction to a resident who cannot pay their occupancy fees because of COVID-19, with some exceptions.

In retrospectively limiting landlords' and proprietors' rights, the Regulation may impact on property rights. The Committee generally comments on provisions drafted to have retrospective effect, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. Similarly, by limiting the ability of the landlord or proprietor to exercise their rights under an existing agreement, the Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants and residents. The provisions outlined above are automatically repealed on 26 March 2021. The Committee notes that the Regulation also furthers the public health objectives of ensuring citizens remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

9. Sporting Venues Authorities Amendment Regulation 2020

Date tabled	LA: 9 February 2021 LC: TBA
Disallowance date	LA: 11 May 2021 LC: TBA
Minister responsible	The Hon. Geoff Lee MP
Portfolio	Minister for Sport, Multiculturalism, Seniors and Veterans

PURPOSE AND DESCRIPTION

1. The *Sporting Venues Authorities Amendment Regulation 2020* (Amendment Regulation) is made under the *Sporting Venues Authorities Act 2008,* including sections 37, 38 and 40 (a general regulation making power).

2. The object of the Amendment Regulation is to amend the *Sporting Venues Authorities Regulation 2019* (Regulation) to reflect the changes arising from the introduction of the *Sporting Venues Authorities Amendment (Venues NSW) Act 2020* and the repeal of the *Sydney Cricket Ground and Sydney Football Stadium By-law 2014*.

3. The Amendment Regulation commenced on 1 December 2020, and includes provisions that:

    a. set out conditions of entry to the 'scheduled lands' (meaning Sydney Cricket Ground, Sydney Football Stadium and nearby land controlled by Venues NSW),

    b. prohibit certain behaviour and bringing certain things (e.g. liquor, animals, glass containers) onto the scheduled lands,

    c. specify what behaviour justifies a person being removed or banned from the scheduled lands,

    d. specify classes of membership and provide for transfer, suspension and cancellation of memberships, and

    e. specify offences for which penalty notices may be issued.

ISSUES CONSIDERED BY THE COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Freedom of movement and administrative review rights

4. A number of clauses in the Amendment Regulation stipulate when individuals may be refused access to, removed from, or banned from the scheduled lands.

5. Under clause 13 of the Amendment Regulation, a person may be refused entry to the scheduled lands by Venues NSW, an authorised officer or a police officer. There are no criteria specified as to when or why entry can be refused under this clause.

6. More specifically, under clause 16(2), a person may also be refused entry or removed from the scheduled lands if they bring or attempt to bring liquor onto the scheduled lands without approval by Venues NSW. It is not clear who is empowered to refuse entry or remove people under this clause.

7. Under clause 36, a member of Venues NSW, a ranger or a police officer may use reasonable force to remove a person from the scheduled lands if they contravene a provision of the Regulation, trespass on the scheduled lands, or cause inconvenience to another person.

8. Under clause 37, Venues NSW may ban a person who contravenes a provision of the Regulation from entering the scheduled lands for up to 24 months. In contrast to clause 6 of the Regulation, which existed before this amendment and relates to bans imposed by sporting venues authorities, Venues NSW is not required to give written notice of a ban under clause 37. Further, Venues NSW is not required to give reasons.

9. Under clause 39(3), a ticket inspector may also order a person to leave if they do not produce a membership card or ticket when requested, do not satisfy the inspector that the ticket has been lost, or produce a ticket or membership card that does not entitle them to be on that part of the scheduled lands.

10. Failure to comply with a ban, an order to leave, refusal of entry, or some other reasonable direction by a ranger, Venues NSW member, or police officer attracts a maximum penalty of 10 penalty units ($1,100).

> **Several provisions in the *Sporting Venues Authorities Amendment Regulation 2020* (Amendment Regulation) impact freedom of movement on scheduled lands, which include the Sydney Cricket Ground and Sydney Football Stadium. They restrict entry to the scheduled lands, and permit individuals to be refused entry to, removed and/or banned from the scheduled lands in certain circumstances. Venues NSW may ban a person from the scheduled lands for up to two years if they contravene a provision of the Regulation. The penalty for non-compliance with a ban is 10 penalty units or $1,100.**
>
> **There does not appear to be any requirement for Venues NSW to provide reasons for these decisions, nor any avenue for bans to be reviewed or appealed.**

These provisions may impact on individuals' freedom of movement. For example, the basis on which a person can be removed under the Regulation is quite broad – including if they 'cause inconvenience' to another person.

However, restrictions on the right to freedom of movement may be warranted in certain circumstances – for example, to protect public order. The provisions in the Regulation are in line with similar regulations governing recreational spaces used by the public, where the site is managed by a trust or authority. The Committee also acknowledges the benefit of the provisions for the majority of those using the scheduled lands, allowing the peaceful enjoyment of the environment and amenities, and discouraging anti-social or disruptive behaviour. Finally, the Committee notes that similar offences restricting freedom of movement existed under the repealed *Sydney Cricket Ground and Sydney Football Stadium By-law 2014*. In the circumstances, the Committee makes no further comment.

Penalty notice offences – right to a fair trial

11. For the purposes of section 38 of the *Sporting Venues Authorities Act 2008*, each offence created by a provision listed in Schedule 1 of the Amendment Regulation is an offence for which a penalty notice may be issued.

12. There are 44 offence provisions listed in the Schedule. Although each offence would usually attract a maximum penalty of $1,100, the amounts stipulated for penalty notices range from $80 to $330.

13. The Committee notes that, under the repealed *Sydney Cricket Ground and Sydney Football Stadium By-law 2014*, many equivalent provisions also attracted penalty notices.

Schedule 1 to the Amendment Regulation lists 44 offence provisions for which penalty notices may be issued. Penalty notices allow a person to pay the amount specified for an offence within a certain amount of time should he or she not wish to have the matter determined by the court. The fine payable under a penalty notice is usually less than the maximum penalty that would otherwise apply. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

The Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the issuing of a penalty notice does not prevent a person from electing to have the matter determined by a court. Still, there is a risk that some may waive this right and pay the on-the-spot fine to avoid the need to attend court and/or the risk of having a larger penalty imposed. However, the Committee notes that similar penalty notices, for equivalent offences, were provided for under the repealed *Sydney Cricket Ground and Sydney Football Stadium By-law 2014*. Given this, and the relatively small size of fines issuable by penalty notice – ranging from $80 to $330 – the Committee makes no further comment.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Strict liability offences not in primary legislation

14. The Amendment Regulation creates a number of offences applicable to individuals, each with a maximum penalty of 10 penalty units ($1,100). A number of the offences introduced are strict liability offences. For example, regardless of their intent, a person commits an offence if they:

    a. bring liquor onto the scheduled lands (clause 16),

    b. consume liquor brought onto those lands (clause 17),

    c. damage lawns, trees, machinery, labels or signs (clauses 19 and 20),

    d. litter (clause 22),

    e. possess a glass container in certain areas (clause 23),

    f. obstruct an employee of Venues NSW from performing their duties (clause 32), or

    g. drive contrary to signs erected by Venues NSW (clause 35).

15. Each of these actions was also an offence under the repealed *Sydney Cricket Ground and Sydney Football Stadium By-law 2014,* with only minor changes to wording.

> **The Amendment Regulation sets out numerous offences relating to behaviour on the scheduled lands, each with a penalty of 10 penalty units ($1,100). A number of these offences are strict liability offences – that is, there is no mental element of intention or recklessness needed in order to prove the offence.**
>
> **The Committee prefers provisions which create offences to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. This is particularly the case where offences affect individual rights and liberties, such as the right to freedom of assembly, discussed above.**
>
> **The Committee also generally comments on strict liability offences as they depart from the common law principle that *mens rea*, the mental element of an offence, is relevant to the imposition of liability. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Given the relatively small penalties attached to these offence provisions, and the fact that similar offences existed under the previous *Sydney Cricket Ground and Sydney Football Stadium By-law 2014*, the Committee makes no further comment.**

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Vague and ill-defined power

16. As discussed above, clauses 12 and 34 of the Amendment Regulation provide that Venues NSW may determine the conditions of entry to the scheduled lands, including

for vehicles. Breach of the conditions of entry under either clause attracts a maximum penalty of 10 penalty units ($1,100).

17. However, these clauses are quite broadly drafted, and do not set out a list of matters to which conditions of entry should relate, or the purpose for which conditions may be imposed.

> **The Amendment Regulation grants Venues NSW some powers that may be ill-defined and could benefit from further clarification. In particular, clauses 12 and 34 provide that Venues NSW may determine terms or conditions of entry to the scheduled lands, but do not provide any guidance as to how those terms or conditions should be determined. Further, there is no provision requiring terms or conditions affecting vehicles to be displayed or communicated to vehicle drivers. Failure to comply with terms or conditions of entry attracts a penalty of up to $1,100. These provisions may thereby make individual liability dependent on an insufficiently defined administrative power.**
>
> **The Committee also notes that the terms or conditions imposed by Venues NSW are not required to be tabled in Parliament, and are therefore not subject to any parliamentary oversight.**
>
> **The Committee prefers provisions that affect rights and obligations to be drafted with sufficient precision so that their scope and intention is clear. However, the Committee acknowledges that it is important in a regulatory context for Venues NSW to retain a relatively high level of discretion. This may include a flexible power to impose different conditions on entry based on vehicle size, type of event, time of day, etc. In the circumstances, the Committee makes no further comment.**

10. Surveillance Devices Amendment (Body Worn Recording Devices) Regulation 2020

Date tabled	LA: 9 February 2021 LC: TBA
Disallowance date	LA: 11 May 2021 LC: TBA
Minister responsible	The Hon. Mark Speakman MP
Portfolio	Attorney General and Minister for the Prevention of Domestic Violence

PURPOSE AND DESCRIPTION

1. The *Surveillance Devices Amendment (Body-Worn Recording Devices) Regulation 2019* commenced in October 2019, amending the *Surveillance Devices Regulation 2014* to exempt ambulance officers from sections 7 and 8 of the *Surveillance Devices Act 2007* for 12 months. Those sections prohibit the installation and use of listening devices and optical surveillance devices.

2. The exemption enabled NSW Ambulance to trial the use of 'body worn cameras' (BWCs) for 12 months, as part of a 'focussed evaluation into the effects of BWCs on occupational violence experienced by Paramedics'.[11] The trial involves 60 cameras worn by several hundred ambulance officers across three sites in NSW. NSW Ambulance states on its website that the trial will assist in the implementation of recommendations made in previous reports[12] aimed at improving personal security for ambulance officers and identifying factors and behaviours that place them at risk.

3. The *Surveillance Devices Amendment (Body-Worn Recording Devices) Regulation 2020* (Amendment Regulation) now extends the trial period by a further 12 months, by substituting the original end date of 30 November 2020 for 30 November 2021.

4. The Amendment Regulation is made under the *Surveillance Devices Act 2007*, including section 59 (the general regulation-making power).

[11] NSW Ambulance, 'Body Worn Camera Pilot', https://www.ambulance.nsw.gov.au/about-us/access-to-information/privacy/body-worn-camera-pilot

[12] These include the NSW Ambulance Occupational Violence Prevention Strategic Advisory Group report (Released November 2016), the Parliamentary inquiry into Violence against Emergency Services Personnel report (Released August 2017), and the Round-table meeting report (Released February 2018).

ISSUES CONSIDERED BY THE COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

Privacy

5. Clause 5 of the *Surveillance Devices Regulation 2014* provides that an ambulance officer is exempt from sections 7 and 8 of the *Surveillance Devices Act 2007* in certain circumstances.

6. Section 7 of the *Surveillance Devices Act 2007* prohibits a person from using a listening device to listen to or record a conversation to which they are not a party, or record a private conversation to which they are a party.

7. Section 9 of the Act prohibits a person from using an optical surveillance device (i.e. video equipment) on premises or in a vehicle if it involves entering or interfering with the premises/vehicle without the owner/occupier's consent.

8. Breach of either of these sections, absent an exemption, attracts a maximum penalty of 500 penalty units (for a corporation) or 100 penalty units or 5 years imprisonment, or both (in any other case).

9. The exemption in clause 5 applies if an ambulance officer:

    a. is acting in execution of their duty, and

    b. is wearing the device, and

    c. either:

        i. makes a reasonable attempt to ensure those likely to be recorded are aware the device is capable of recording sound and/or images, or

        ii. believes there is a significant risk of harm to themselves or another person, or

        iii. the recording is accidental.

10. As noted above, clause 5 was introduced by the *Surveillance Devices Amendment (Body-Worn Recording Devices) Regulation 2019,* which commenced on 28 October 2019. While the clause was originally due to expire on 30 November 2020, the Amendment Regulation has extended the trial period until 30 November 2021.

    The *Surveillance Devices Amendment (Body-Worn Recording Devices) Regulation 2020* (Amendment Regulation) extends the trial period during which ambulance officers will be exempt from certain requirements of the *Surveillance Devices Act 2007* for 12 months.

    This exemption, and its extension by the Amendment Regulation, has the potential to impact individuals' right to privacy, as it permits ambulance officers to record people without their consent in certain circumstances; for example, if the ambulance officer believes there is a significant risk of harm to themselves

or another person. Relevantly, ambulance officers are likely to interact with vulnerable members of the public – for example, those who are sick or injured. Further, it is unclear from the regulation how recordings captured by body worn surveillance devices will be stored, or for how long, or how they can be used.

However, the Committee acknowledges that the exemption is associated with a trial, and as such only some ambulance officers in NSW wear the surveillance devices. There are also safeguards accompanying the exemption, including that the exemption does not apply unless the ambulance officer informs a person that they might be recorded, or somebody may be at a significant risk of harm, or the recording is accidental. In addition, the Committee recognises the public interest in deterring violence and anti-social behaviour towards ambulance officers. In the circumstances, the Committee makes no further comment.

Appendix One – Functions of the Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to Bills

1 The functions of the Committee with respect to Bills are:

(a) to consider any Bill introduced into Parliament, and

(b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:

i trespasses unduly on personal rights and liberties, or

ii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or

iii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or

iv inappropriately delegates legislative powers, or

v insufficiently subjects the exercise of legislative power to parliamentary scrutiny

2 A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations

1 The functions of the Committee with respect to regulations are:

(a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,

(b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:

i that the regulation trespasses unduly on personal rights and liberties,

ii that the regulation may have an adverse impact on the business community,

iii that the regulation may not have been within the general objects of the legislation under which it was made,

iv that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

v that the objective of the regulation could have been achieved by alternative and more effective means,

vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,

vii that the form or intention of the regulation calls for elucidation, or

viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and

(c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

2 Further functions of the Committee are:

(a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and

(b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.